ASPATRA SDN. BHD. & ORS.

v.

BANK BUMIPUTRA (M) BHD. & ANOR.

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
GEORGE SEAH SCJ
MOHD. AZMI SCJ
[CIVIL APPEAL NO. 212 OF 1985]
25 SEPTEMBER 1987

CIVIL PROCEDURE: *Mareva Injunction - Ex parte application to restrain defendant from transferring his assets out of jurisdiction - Whether High Courts in Malaysia have jurisdiction to grant Mareva Injunction - Extended to defendant's assets in other banks not cited in order - To restrain defendant from dissipating his assets up to amount claimed in writ - Jurisdiction and power of High Court.*

CIVIL PROCEDURE: *Stare decisis - Principles applicable - Question of jurisdiction - Precedent.*

CIVIL PROCEDURE: *Inter Partes Application - Affidavit evidence - Sworn subsequent to ex parte application and grant of Mareva Injunction - Whether admissible in subsequent inter partes proceedings.*

COMPANY LAW: *Corporate Veil - Lifting corporate veil of interveners - Whether assets of interveners were assets of defendant - Object of lifting corporate veil - Whether companies and shareholders were same entity.*

CIVIL PROCEDURE: *Anton Piller Order - To identify all assets within jurisdiction owned by defendant - Whether it was necessary - Justification to issue Anton Piller Order - Whether discretion exercised on correct principles.*

In this appeal, the Supreme Court by agreement of both parties considered the following four main grounds:

(1) Whether the High Courts in Malaysia had jurisdiction to grant Mareva injunction.

(2) Whether the affidavit of Mr. Chan Kah Hong sworn on 29 January 1985 made subsequent to the *ex parte* application and the granting of Mareva injunction, was admissible in subsequent *inter partes* proceedings.

(3) In granting Mareva injunction, whether Zakaria J was correct in lifting the corporate veil of the interveners and in holding that the assets of the interveners were the assets of Lorrain, the defendant.

(4) Whether the learned Judge was correct in granting the Anton Pillar order against Aspatra Sdn. Bhd.

Held:

[1] The additional powers of the High Court conferred by s. 25(2) of the Courts of Judicature Act 1964 which under para. 6 of the Schedule includes the power to provide for "the interim preservation of property the subject matter of any cause or matter ... by injunction ... or in any manner whatsoever", is wide enough to confer jurisdiction on the High Court to provide for an injunction in the manner of the Mareva. Indeed the provision of O. 92 r. 4 of the

Rules of the High Court 1980 referred to by Edgar Joseph Jr J in the *Pacific Centre* case, would appear to give further support to the existence rather than non-existence of the Court's jurisdiction and power to grant the remedy.

[2] If the principle of *stare decisis* is to have any meaning, the case of *Zainal Abidin* (Raja Azlan Shah CJ (as he then was)) is the authority for holding the proposition that the High Courts in Malaysia have jurisdiction to grant Mareva injunction in appropriate circumstances. Our para. 6 or the Schedule to the Courts of Judicature Act read with O. 29 RHC 1980 and s. 50 of the Specific Relief Act 1950, is wide enough to confer the necessary jurisdiction to issue the Mareva injunction prayed for.

[3] In this case, the learned Judge was satisfied on the evidence before him that BBMB and BMF had shown that they had a good arguable case; that the defendant had assets within jurisdiction; and that there was a risk of the assets being removed before the judgment could be satisfied. The claim was in respect of secret profits received by Lorrain, the defendant, and there was a grave danger and a real risk that his monies in the various banks and assets in the appellant companies would disappear. In the circumstances, the Supreme Court held that the learned Judge not only had jurisdiction to grant the Mareva injunction prayed for, but he had also granted the injunctive remedy on correct principles.

[4] On the facts of this case, the appellant companies need not be made parties at that stage of the Mareva proceedings. Speed is the essence of Mareva injunction and as such the learned Judge was correct in issuing the *ex parte* order against the companies after lifting the corporate veil although the appellants were not then parties in the *ex parte* proceedings.

[5] Chan Kah Hong's affidavit of 29 January 1985 which exhibited the result of searches made at the Registry of Companies pertaining to the share holdings of the appellant companies was admissible in the *inter partes* proceedings which was subsequent to the granting of the *ex parte* Mareva order on 10 January 1985. The second ground of appeal must therefore fail.

[6] On the evidence before the learned Judge, he was not wrong in law in piercing the corporate veil of the appellants. There was admittedly an element of fraud in the receipt of the secret profits whatever might be the capacity in which Lorrain, the defendant, had received them. This was sufficient for the Court to lift the corporate veil for the purpose of determining whether the assets of the companies are really owned by them as envisaged in *Solomon v. Solomon* and s. 16(5) of the Companies Act 1965, and not merely an abuse of the statutory principle of the companies being separate legal entities from their shareholders and directors. There was no merit in the third ground of appeal.

[7] In the instant case, the corporate veil having been properly lifted and Lorrain, the defendant, having been exposed as the *alter ego* of Aspatra, it became necessary to identify all assets within jurisdiction owned by Lorrain, the defendant. The order in terms granted by the learned Judge, extensive though it might be, was necessary as it was an aid to justice as far as BBMB and BMF were concerned. Therefore, this was an appropriate case to grant the Mareva injunction together with the Anton Piller order, after the corporate veil had been lifted.

[Appeal dismissed with costs.]

Cases referred to:

Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd. [1982] CLJ (Rep) 307; [1982] 1 MLJ 260

Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Berhad [1984] 2 CLJ (Rep) 319

Ace King Pte.Ltd. v. Circus Americano Ltd. & Ors. [1985] 2 MLJ 75

S & F International Limited v. Trans-Con Engineering Sdn. Bhd. [1985] CLJ (Rep) 280

Mareva Compania Naveria SA v. International Bulkcarriers SA [1980] 1 All ER 213

Jones v. Lipman [1962] 1 All ER 442
SCF Finance Co. Ltd. v. Masri & Anor. [1985] 2 All ER 747
Munn v. Longden [1884] 50 LT 356; 32 WR 675
Third Chandris Shipping Corporation & Anor v. Unimarine SA [1979] 2 All ER 972
Hadmor Productions Ltd. & Ors. v. Hamilton & Ors. [1982] 2 WLR 322; [1982] 1 All ER 1042
Tay Bok Choon v. Tahansan Sdn. Bhd. [1987] CLJ (Rep) 24
Ebrahimi v. Westbourne Gallery Ltd. [1973] AC 360
Solomon v. Solomon [1927] AC 22
Re a Company [1985] BCLC 333
Macaura v. Northern Assurance Company [1925] AC 619
Anton Piller K.G. v. Manufacturing Process Ltd. [1976] 2 WLR 162
Lian Keow Sdn. Bhd. v. C. Paramjothy & Anor. [1982] CLJ (Rep) 522
Yousif v. Salama [1980] 3 All ER 405
Emanuel v. Emanuel [1982] 1 WLR 669
CBS United Kingdom Ltd. v. Lambert & Anor. [1982] 3 All ER 237
Mills v. Northern Railway of Buenos Ayres [1870] LR 5 Ch App 621
Robinson v. Pickering [1880-81] 16 Ch D 660
Lister & Co. v. Stubbs [1890] 45 Ch D 1
Nippon Yusen Kaisa v. Karageorgis & Anor. [1975] 3 All ER 282
Mareva Compania Naviera SA v. International Bulkcarriers SA [1975] 2 Lloyd's LR 509
Rasu Maritima SA v. Perusahaan Pertambangan Minyak dan Gas Negara (Pertamina) [1977] 3 All ER 324
The Siskina [1979] AC 210
Cretanor Maritime Ltd. v. Irish Marine Ltd. [1978] 3 All ER 164
Tee Than Song v. Caltex Oil Malaysia Ltd. [1970] 1 MLJ 68
Pahang South Union Omnibus Co. Bhd. v. Minister of Labour & Manpower [1981] CLJ (Rep) 74
Damodaran v. Vasudevan [1975] 2 MLJ 231
Damodaran v. Choe Kuan Hin [1979] 2 MLJ 267
Gouriet v. UPW (Union of Post Office Workers) [1978] AC 435
North London Railway Co. v. Great Northern Railway Co. [1883] 11 QBD 30
Magor & St.Mellons RDC v. Newport Corporation [1952] AC 189
London Transport Executive v. Batts [1959] AC 213
Galaxia Maritime SA v. Mineralimportexport [1982] 1 All ER 796
Z Ltd. v. A [1982] 1 All ER 556

Legislation rerferred to:

Companies Act 1965, ss. 16(5), 218(1)(i)
Court of Judicature Act 1964, ss. 3, 25(2), para. 6 Schedule
Debtors Act 1957, s. 19
Federal Constitution, art. 121
Rules of the High Court 1980, O. 29, O. 92 r. 4
Specific Relief Act 1950, ss. 4, 4(c), 5, 50, 50(1), 51(1)
Supreme Court of Judicature Act 1925 [UK], ss. 45, 45(1), 50
Supreme Court Act 1981 [UK] ss. 37, 37(1), (3)
Supreme Court of Judicature (Consolidation) Act 1873 [UK], s. 25(8)
Supreme Court of Judicature (Consolidation) Act 1925 [UK], s. 45(1)

Other sources referred to:

Palmers Company Law, Schmitthoff, 23rd Edn., Vol. I, p. 210

For the appellants/interveners - Anad Krishnan (S. Zachariah with him); M/s. Fernandez & Co.
For the respondents - T. Thomas (A. Sreenevasan with him); M/s. Skrine & Co.

JUDGMENT

Mohd. Azmi SCJ:

We have dismissed this appeal by majority and we now give our reasons.

By a writ filed on 10 January 1985, Bank Bumiputra Malaysia Berhad (BBMB) and its wholly owned subsidiary in Hong Kong, Bumiputra Malaysia Finance Ltd. (BMF) sued Lorrain Esme Osman (Lorrain) for the return to them the total sum of RM27,625,853.06 cts which they claimed were secret profits made by Lorrain without their knowledge and approval, arising from various loans and banking facilities amounting to more than HK$3.2 billion to Carrian group of companies in Hong Kong. At all material times, Lorrain was a director of BBMB and also the chairman of BMF. When the writ was filed, BBMB and BMF also made an *ex parte* application in chambers for a Mareva injunction to restrain Lorrain from transferring his assets out of jurisdiction, and also for an order of discovery for Lorrain to disclose the value, nature and whereabouts of all his assets. Zakaria J granted the orders on the same day i.e., on 10 January 1985. The orders could not be served on Lorrain and as a result, on 15 January 1985, Zakaria J on the application of BBMB and BMF extended the 10 January Mareva injunction to Lorrain's assets in 32 other banks in addition to the 6 banks cited in the earlier order, and also to his shares held in 104 other companies apart from Aspatra Sdn. Bhd. and the 4 companies mentioned in the original order, for the purpose of restraining Lorrain from dissipating his assets up to the amount claimed in the writ. On the same date, the Court also granted an Anton Piller order against Aspatra Sdn. Bhd. which was subsequently varied on 17 January and extended to other companies. It cannot be seriously disputed that Lorrain had disappeared from this country by the time the writ was filed. At any rate, when the appeal was heard, it was common knowledge that he had been arrested in London for the purpose of being extradited to Hong Kong to face criminal charges there. It is necessary to make this brief reference to the international and criminal elements, popularly referred to as "the BMF scandal" in the background situation of this case in order to appreciate the extensive and extraordinary nature of the various orders applied for and granted by Zakaria J.

Aspatra Sdn. Bhd. and the other companies affected were allowed to be joined as interveners in the Mareva proceedings to enable them to set aside the *ex parte* injunction and Anton Piller orders made against them. The applications to set aside the *ex parte* orders by the various companies were filed and heard in batches, and by 18 February 1985 there were still 77 companies affected by the 15 January Mareva injunction which had not intervened. Of these, 12 had been discharged from the said orders on the application of BBMB and BMF themselves. The injunction in respect of the remaining 65 companies remained in force, but as in the case of the 27 companies which had intervened, the terms of the injunction were varied to enable the companies to carry on with their day to day business. Aspatra Sdn. Bhd. and 21 other companies which had intervened had appealed against the order dated 26 April 1985 in respect of such part only of the said order which dismissed (1) the interveners' application for dissolution of the Mareva injunction granted on 1 & 15 January 1985 and (2) the Aspatra Sdn. Bhd.'s application for dissolution of the Anton Piller order made against them as varied by the order dated 17 January 1985.

The memorandum of appeal as amended contained a number of grounds but by agreement of both parties we only considered the following four main grounds:

(1) Whether the High Courts in Malaysia had jurisdiction to grant Mareva injunction.

(2) Whether the affidavit of Mr. Chan Kah Hong sworn on 29 January 1985 made subsequent to the *ex parte* application and the granting of Mareva injunction, was admissible in subsequent *inter partes* proceedings.

(3) In granting Mareva injunction, whether Zakaria J was correct in lifting the corporate veil of the interveners and in holding that the assets of the interveners were the assets of Lorrain.

(4) Whether the learned Judge was correct in granting the Anton Piller order against Aspatra Sdn. Bhd.

On the first ground, this was not the first time that the issue of jurisdiction had been raised. The issue was first canvassed in *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd.* [1981] CLJ (Rep) 307, where Hashim Yeop Sani J (as he then was) dismissed an application for Mareva on the ground that the relief sought was unknown in Malaysian law as there was no equivalent provision to s. 45 of the English Court of Judicature Act 1925. On appeal to the **Federal Court** [1982] 1 MLJ 260, it was held otherwise, although the appeal was dismissed on factual grounds. Raja Azlan Shah CJ (as he then was) ruled that the High Courts in Malaysia had jurisdiction to grant Mareva injunction in appropriate circumstances since "para. 6 of the Schedule to the Courts of Judicature Act 1964 would appear to be equivalent provision to s. 45 of the English Supreme Court of Judicature (Consolidation) Act 1925 ..." With respect we agree with that conclusion, because it seems clear that when one relies on para. 6 for the remedy of interim preservation of property it must necessarily be done by way of injunction. In our opinion the additional powers of the High Court conferred by s. 25(2) of the 1964 Act which under para. 6 of the Schedule includes the power to provide for "the interim preservation of property the subject matter of any cause or matter ... by injunction ... or in any manner whatsoever", is wide enough to confer jurisdiction on the High Court to provide for an injunction in the manner of the Mareva. The importance of the relief by way of injunction for the purpose of preserving assets and preventing a defendant from dissipating his assets within jurisdiction before judgment, is made very clear in the following passage at p. 263 of the Federal Court judgment:

> In this country we encourage greater foreign participation and investment in development projects. In such a situation where foreign businessmen including foreign multinational corporations have injected large sums of money and have substantial assets in this country, it would be a potential vehicle of injustice if the plaintiff is denied the facilities afforded by a Mareva injunction against the foreign defaulter who may try to dissipate his funds and assets in this country.

The decision in *Zainal Abidin* had been followed in *Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd.* [1984] 2 CLJ (Rep) 319, *Ace King Pte. Ltd. v. Circus Americano Ltd. & Ors.* [1985] 2 MLJ 75 and in *S & F International Limited v. Trans-Con Engineering Sdn. Bhd.* [1985] CLJ (Rep) 280. There should be no doubt now that the Mareva remedy is here to stay. The issue of jurisdiction has been discussed thoroughly in all the cases cited, and with respect we are not persuaded that out Courts have no jurisdiction to do what is just by way of Mareva injunction. Indeed the provision of O. 92 r. 4, Rules of the High Court 1980 referred to by Edgar Joseph Jr J in the *Pacific Centre* case, would appear to give further support to the existence rather than non-existence of the Court's jurisdiction and power to grant the remedy. Article 121 of the Federal Constitution provides that the judicial power of the Federation shall be vested in the superior Courts and in such inferior Courts as may be provided by Federal Law. We are unable to accept that on grounds of technicalities and narrow interpretation of the wordings in the relevant provisions of the 1964 Act, the Specific Relief Act 1950, and O. 29 RHC 1980, the Courts are powerless to do what is just for the preservation of assets within jurisdiction by way of Mareva injunction. There is no magic in the word "Mareva". It is merely a type of injunction - a remedy so vital to combat unfairness in economic activities relating to our national and international trade and business. The generality of the judicial power already vested in the superior Courts by the supreme law of the land is unlimited, and for the purpose of achieving justice, the power of the Courts to

do what is just under any law requires no special legislation. After all, when Mareva injunction was first "discovered" by Lord Denning in *Mareva Compania Naveria SA v. International Bulkcarriers SA* [1980] 1 All ER 213, s. 37(3) of the English Supreme Court Act 1981 had not been enacted. The jurisdiction to grant Mareva injunction was then based on s. 45 of the Supreme Court of Judicature (Consolidation) Act 1925 which was the successor to s. 25(8) of Judicature Act 1873. Section 45 provides:

> (1) The High Court may grant a *mandamus* or an injunction or appoint a receiver by an interlocutory order in all cases in which it shall appear to the Court to be just and convenient so to do.
>
> (2) Any such order may be made either unconditionally or on such terms and conditions as the Court thinks just.

Unlike our para. 6, the English provision made no express reference to the interim preservation of property by injunction. Further, s. 50 of our Specific Relief Act 1950 appears to confer wider powers than in England when it provides:

> Preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual.

Section 37 of the 1981 English Act replaced the 1925 provision by enacting:

> (1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so.
>
> (2) Any such order may be made either unconditionally or on such terms and conditions as the Court thinks just.
>
> (3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.

Merely because we do not have exactly the same provision as the English s. 45 of the 1925 Act or s. 37 of the 1981 Act, cannot in our view be sufficient ground for depriving our Courts with jurisdiction to issue the Mareva type of injunction. Section 45 of the 1925 Act restricted the English Courts to issue injunction to cases where "it appears to the Court to be just or convenient", as opposed to the wider "discretion" given to our Courts by s. 50, although s. 37(3) of the English 1981 Act would appear to widen the use of injunction for the preservation of assets by extending it to cases where the party is not domiciled, resident or present within jurisdiction. We are of the opinion that our para. 6 of the Schedule to the Courts of Judicature Act read with O. 29 RHC and s. 50 of the Specific Relief Act, is wide enough to confer the necessary jurisdiction to issue the Mareva injunction prayed for although Parliament may find it necessary in future to impose whatever limitation it may deem fit in the exercise of that discretionary power. There is no new argument before us which would justify us to change the legal position as laid down in *Zainal Abidin* and subsequent cases. As stated earlier it may well be that the legislature should provide a separate law on this type of injunction for the purpose of defining its scope, but it is not a necessary pre-requisite to the exercise of such power referred to in para. 6 of the Schedule to the 1964 Act, as far as the power concerned the jurisdiction of the High Courts to grant the remedy of interim preservation of property by way of injunction not only in respect of any property the subject matter of any "cause" as defined in s. 3 of the Act but also of any "matter" as defined in the same section and explained in *Zainal Abidin*, so long as the assets are within jurisdiction. If the principle of *stare decisis* is to have any meaning, the case of *Zainal Abidin* is the authority for holding the proposition that the High Courts have jurisdiction to grant

Mareva injunction in appropriate circumstances. We see no real purpose, except for inviting confusion and uncertainties in the law, in relitigating the issue of jurisdiction.

In this particular case, the learned Judge was satisfied on the evidence before him that BBMB & BMF had shown that they had a good arguable case; that the defendant had assets within jurisdiction; and that there was a risk of the assets being removed before the judgment could be satisfied. The claim was in respect of secret profits received by Lorrain and there was a grave danger and a real risk that his monies in the various banks and assets in the appellant companies would disappear. In the circumstances we held that the learned Judge not only had jurisdiction to grant the Mareva injunction prayed for, but he had also granted the injunctive remedy on correct principles.

On the facts of this case, there were good and valid reasons for granting the injunction and allowing it to continue. According to affidavit evidence, Lorrain was and still is in London, facing an extradition proceeding by Hong Kong Government. If the injunction was not granted, there was every likelihood that BBMB & BMF would suffer a great injustice. Speed is the essence of Mareva remedy. It would be unjust to allow Lorrain assets to remain free until the conclusion of the extradition proceeding in London and the criminal trial in Hong Kong. In our opinion BBMB & BMF had a good arguable case on the merits, and there was no conceivable reason why the *ex parte* injunction prayed for ought to have been refused or for the injunction already granted dissolved at this stage. Mr. Krishnan, Counsel for the appellants argued that on the authority of *Jones v. Lipman* [1962] 1 All ER 442, the appellant companies ought to be made parties to the proceedings before the *ex parte* injunction was issued. As stated earlier on, the original Mareva injunction dated 10 January 1985 was only granted against Lorrain, 6 banks and 5 companies. But Lorrain could not be traced anywhere in the country for the order to be served. In fact until today, he has not made any attempt to set aside the order although the solicitors representing the appellant companies are also representing Lorrain. It was under these circumstances that the learned Judge granted the extension of the Mareva to a total of 36 banks and 109 companies. Secondly, as conceded by Mr. Krishnan, *Jones v. Lipman* was a specific performance case. In our view, on the facts of this case, the appellant companies need not be made parties at that stage of the Mareva proceedings. At the risk of being repetitive, speed is the essence of Mareva injunction and as such the learned Judge was correct in issuing the *ex parte* order against the companies after lifting the corporate veil although the appellants were not then parties in the *ex parte* proceedings. The *ex parte* orders did not prevent them from setting aside the interlocutory injunction, and they did in fact become parties to the proceedings as interveners. It was in fact by their consent that the terms of the injunction were varied to enable the appellant companies to carry on with their day to day business by allowing them to operate their banking accounts and even to deal with their assets subject to the leave of the Court. It is true that the Courts will always be astute to ensure that third parties' rights are fully protected, but in this appeal, the appellant companies are not real third parties in the sense referred to by Lloyd LJ in *SCF Finance Co. Ltd. v. Masri & Anor.* [1985] 2 All ER 747.

On the next ground of appeal, which is on the admissibility of the affidavit of Mr. Chan Kah Hong sworn on 29 January 1985, it was Mr. Krishnan's submission both here and below that it was inadmissible in the *inter partes* proceeding subsequent to the granting of the *ex parte* Mareva order on 10 January as extended on 25 January, on the ground that it constituted fresh evidence, and since the evidence was available during the *ex parte* proceedings, the learned Judge ought not to have admitted this affidavit evidence on the authority of *Munn v. Longden* [1884] 50 LT 356-357; 32 WR 675-676. When overruling Mr. Krishnan's objection, the learned Judge held on the facts that the affidavit evidence which

extended the results of searchers made at the Registry of Companies pertaining to the share holdings of the appellant companies, were not available during the *ex parte* proceeding because the registry was moving premises and was closed from 15 December. As pointed out by the learned Judge, in *Third Chandris Shipping Corporation & Anor. v. Unimarine SA* [1979] 2 All ER 972, the English Court of Appeal allowed further evidence to be adduced before it in deciding a Mareva case. Similarly in *Hadmor Productions Ltd. & Ors. v. Hamilton & Ors.* [1982] 2 WLR 322; [1982] 1 All ER 1042, the House of Lords recognised that further affidavit might be adduced in considering whether interlocutory injunction should be granted or not. In *Tay Bok Choon v. Tahansan Sdn. Bhd.* [1987] CLJ (Rep) 24 the Privy Council held that in winding up proceedings the trial Judge could not refuse to read affidavits which had been properly sworn, filed and produced to him, unless some opposing party had applied for the attendance for cross-examination of the deponent and that application had been granted and the deponent did not attend. We are of the view that in *ex parte* or *inter partes* Mareva proceedings all relevant affidavits properly filed must be considered by the Court. In *Hadmor Productions* in holding that further evidence could be admissible even at the appellate stage, Lord Diplock had this to say at p. 1046:

> The function of the appellate Court is initially one of review only. It may set aside the Judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the Judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the Judge made his order that would have justified his acceding to an application to vary it. Since reasons given by the Judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the Judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable Judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate Court has reached the conclusion that the Judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own.

We are therefore of the view that not only Chan Kah Hong's affidavit of 29 January 1985 admissible but also that of Johari bin Zakaria sworn on 25 November 1986 which disclosed changing circumstances i.e., that Lorrain had been arrested in London for the purpose of being extradited to Hong Kong in order to face criminal charges in the British Colony arising from his role in the BMF/Carrian affair. The second ground of appeal must therefore fail.

The remaining two grounds would appear to be inter-related. The lifting of the corporate veil of the appellant companies is intertwined with the issue of the Mareva and Anton Piller orders. It would be observed that the only purpose of going against the appellant companies was to lift the corporate veil so that assets of the companies could be held or deemed to be the assets of Lorrain - he and the companies having merged with the appellant companies or become interchangeable. There was no dispute that only 32 out of 21,796,395 shares in the appellant companies did not belong to Lorrain. In short he exercised the effective or sole control of the companies by holding more than 99% of the total paid up capital of the 22 appellant companies. Further, he was also a director in 15 of them. These were the main factual basis on which Zakaria J lifted the corporate veil. It must be emphasised that if the learned Judge was correct in lifting the corporate veil, then the extension of the Mareva to the appellant companies and the issue of the Anton Piller order against Aspatra Sdn. Bhd., were merely the consequences of piercing the veil. As adverted to earlier, the object of lifting

the corporate veil was to see whether the companies and their share holders were in fact the same entity. This is consistent with what was stated by Lord Wilberforce in *Ebrahimi v. Westbourne Gallery Ltd.* [1973] AC 360 and quoted with approval by the Privy Council in *Tay Bok Choon v. Tahansan Sdn. Bhd. (ante)* when commenting on the words "just and equitable" in s. 218(1)(i) Companies Act 1965. Those words ".... are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of his own: that there is room in Company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure". The Court would generally lift the corporate veil in order to justice particularly when an element of fraud is involved although the consequences of lifting the veil would vary according to the circumstances of each case. Sometimes the consequences may be in favour of the companies and yet at another time they may be against them. (see *Palmers Company Law* by Schmitthoff 23rd Edn., Vol. I at p. 210). On the evidence before him, we do not think that the learned Judge was wrong in law in piercing the corporate veil of the appellants. The secret profits received by Lorrain were not denied on affidavit evidence; only the legal capacity under which Lorrain had received them was being contested. There was admittedly an element of fraud in the receipt of the secret profits whatever might be the capacity in which Lorrain had received them. In our view, this is sufficient for the Court to lift the corporate veil for the purpose of determining whether the assets of the companies are really owned by them as envisaged in *Solomon v. Solomon* [1927] AC 22 and s. 16(5) of the Companies Act, and not merely an abuse of the statutory principle of the companies being separate legal entities from their shareholders and directors. As stated by Cunning-Bruce LJ in *Re a Company* [1985] BCLC 333, where the English Court had lifted the veil in a Mareva situation:

> In our view before and after *Wallersteiner v. Moir* [1974] 1 WLR 991 show that the Court will use its powers to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration.

Although the learned Judge did not say so expressly in his judgment, he in fact found the existence of such an abuse from the very structure of the companies after lifting the corporate veil. Hence his conclusion at pp. 49 to 50 of his judgment that "the assets of these 75 companies are the assets of Lorrain". In short, the learned Judge found that Lorrain was the *alter ego* of the companies, and the assets of the appellant companies are in fact and in law Lorrain's assets. Mr. Krishnan relied heavily on the House of Lords case of *Macaura v. Northern Assurance Company* [1925] AC 619-633 HL which held that the claimant had not either as shareholder or creditor any insurable interest in the timber insured, notwithstanding that he was the sole shareholder in the sawmill company and was also a creditor of the company. It is doubtful that *Macaura* could assist the appellants.There the claim to insurable interest in the timber was based on the claimant's position as a shareholder or main creditor of the company which owned the timber, the subject matter of the policies. The claim was not directly fought on the basis that the claimant being the sole shareholder had no separate legal entity from the company when the corporate mask was removed. There was no discussion on lifting of the corporate veil. It was the case of an insurance claim by a shareholder and easily distinguishable from a claim for the recovery of secret profits received by the chairman or director of a company where an element of fraud was readily inherent. We therefore found no merit in the third ground of appeal.

An Anton Piller order which derives its name from the case of *Anton Piller K.G. v. Manufacturing Process Ltd.* [1976] 2 WLR 162 was first reported in this country in *Lian Keow Sdn. Bhd. v. C. Paramjothy & Anor.* [1982] CLJ (Rep) 522, where in a claim for land held in trust for the plaintiff, Yusof Abdul Rashid J granted the order because there was a

serious danger of the first defendant destroying the trust deed and file relating to the said land. In this appeal, the Anton Piller order was issued against Aspatra in aid of the Mareva injunction, and Mr. Krishnan contended that there was no authority for the proposition that it could be granted in respect of documents which did not form the subject matter of the claim. In *Yousif v. Salama* [1980] 3 All ER 405, the English Court of Appeal held that the Court had a discretion to grant an Anton Piller order to enable the preservation of a document which did not itself form the subject matter of the action, where (per Lord Denning MR) the document was the best possible evidence and the plaintiff genuinely feared that the defendant would destroy it prior to the hearing of the action, or where (per Donaldson LJ) there was a very clear *prima facie* case leading the Court to fear that the defendant would conceal or destroy essential evidence and that to do so would deprive the plaintiff of any evidence on which to put forward his claim and so frustrate the process of justice,or where (per Brightman LJ) there was *prima facie* evidence that essential documents were at risk. Again in *Emanuel v. Emanuel* [1982] 1 WLR 669-679, in a motion for ancillary relief in divorce proceedings, the Anton Piller order granted by Wood J extended to documents which were not strictly related to maintenance, the subject-matter of claim. It even extended to all documents relating to the sale by the first respondent and the proceeds of sale of shares in any company and of any capital assets. In the headnote of *CBS United Kingdom Ltd. v. Lambert & Anor*. [1982] 3 All ER 237 it was held:

> In the circumstances it was a clear case for the Court to order discovery of assets and delivery up pending trial of a particular kind of asset because there was reason to believe that the defendant had put such profits as he had made from infringing the plaintiffs' copyrights into easily removable and disposable chattels such as motor vehicles, and, since he claimed to be unemployed, there was no reason to think that he used the motor vehicles for the purposes of earning his living or that he and his wife would suffer hardship if an order for their delivery up were made. Moreover, the possibility of self-incrimination on the charge of handling stolen property was not in the circumstances a bar to ordering discovery. It followed therefore that the Court would allow the appeal, grant the order sought and order the defendant and his wife to disclose the value, nature and whereabouts of their assets, including bank and other accounts, and to deliver up, pending trial, the motor vehicles in their possession, to be kept in a garage chosen by the plaintiffs' solicitors.

In the instant case the corporate veil having been properly lifted and Lorrain having been exposed as the *alter ego* of Aspatra, it became necessary to identify all assets within jurisdiction owned by Lorrain. The order in terms granted by the learned Judge, extensive though it might be, was necessary as it was an aid to justice as far as BBMB and BMF were concerned. Mr. Krishnan also complained that there was no evidence of Lorrain's misconduct to justify the issue of the Anton Piller order. We did not think so. Lorrain's conduct was material in this case not only in regard to the granting of Mareva injunction but also the Anton Piller order, and this factor had been rightly and sufficiently considered by the learned Judge.

In this appeal Counsel for the appellants had failed to persuade us that the grant of Mareva injunction and Anton Piller order was unsound or unfair. In our view, this was an appropriate case to grant the Mareva injunction together with the Anton Piller order, after the corporate veil had been lifted. BBMB and BMF had complied substantially with the guidelines laid down by Lord Denning at p. 984 in the *Third Chandris Shipping* case *(ante)* and we were satisfied that Zakaria J had exercised his discretion on correct principles, and that there was no merit in the criticism of his conclusion which he had reached in exercising his discretion. We would like however to adopt the following caution given by Lord Denning MR in the *Third Chandris Shipping* case at p. 985:

> In setting out those guidelines, I hope we shall do nothing to reduce the efficacy of the present practice. In it speed is of the essence. *Ex parte* is of the essence. If there is delay, or if advance warning is given, the assets may well be removed before the injunction can bite. It is rather like the new injunction in Chancery, the Anton Piller injunction, which has proved equally beneficial. That must be done speedily in *ex parte* before the incriminating material is removed. So here in Mareva injunction before the assets are removed. The solicitors of the City of London can, I believe, continue their present practice so long as they do it with due regard to their responsibilities: and so long as the Judges exercise a wise discretion so as to see the procedure is not abused.

For the above reasons, this appeal was dismissed with costs.

George Seah SCJ:

The only substantial issue arising in this appeal which is strictly one of law is whether, the High Court in Malaya has jurisdiction to grant a Mareva injunction? For the purpose of this appeal, a Mareva injunction may be described as a type of interlocutory order granted on the application of a plaintiff to restrain a defendant from transferring or otherwise dealing with his property within the jurisdiction of the Court albeit the former asserts no proprietary claim over the said assets. I propose to deal with this question in 2 parts: (1) the position in England and (2) the position in West Malaysia.

The position in England

By way of introduction I would quote a passage in the judgment of Lord Hatherley LC sitting in the Court of Appeal in Chancery, in the case of *Mills v. Northern Railway of Buenos Ayres* [1870] LR 5 Ch App 621:

> Work is done for a limited company; no engagement is taken from them by way of security; no debenture or mortgage is granted by them; but the work is done simply on the credit of the company. The only remedy for a creditor in that case is to obtain his judgment and to take out execution; or it may be that he may have a power, if the case warrants it, of applying to wind up the company. But it is wholly unprecedented for a mere creditor to say, 'Certain transactions are taking place within the company, and dividends are being paid to shareholders which they are not entitled to receive, and therefore I am entitled to come here and examine the company's deed, to see whether or not they are doing what is *ultra vires,* and to interfere in order that, as by a bill *quia timet,* I may keep the assets in a proper state of security for the payment of my debt whensoever the time arrives for its payment.'
>
> ... yet I have never before heard - and I asked in vain for any such precedent - of any attempt on the part of a creditor to file a bill of this description against a company, claiming the interference of this Court on the ground that he, having no interest in the company, except the mere fact of being a creditor, is about to be defrauded by reason of their making away with their assets. It would be a fearful authority for this Court to assume, for it would be called on to interfere with the concerns of almost every company in the kingdom against which a creditor might suppose that he had demands, which he had not established in a Court of justice, but which he is about to proceed to establish ...

This was followed by *Robinson v. Pickering* [1880-81] 16 Ch D 660 a decision of the Court of Appeal where s. 25(8) of the Supreme Court of Judicature (Consolidation) Act 1873 was cited and relied on by the plaintiff/Robinson. In the course of the appeal James LJ remarked that:

> You cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property.

In setting aside the injunction granted by Malins VC, Sir Jessel MR said at p. 662:

> According to well-established principles and settled law a creditor who has got no judgment against the separate estate of a married woman cannot interfere to prevent her from dealing with her property.

At the next page James LJ said:

> The creditor is only entitled to obtain a judgment, and then execution will go against the separate estate. I agree with the Master of the Rolls that a creditor is no more entitled to such an injunction as this against a married woman than he would be entitled to it against a man.

The third member of the Court of Appeal Lush LJ merely observed that:

> I am entirely of the same opinion.The law on the subject is quite settled.

This view of the law seemed to be accepted by Cotton LJ in another Court of Appeal case of *Lister & Co. v. Stubbs* [1890] 45 Ch D 1. At p. 13 the learned Lord Justice said:

> I know of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree.

At p. 14 the learned Lord Justice continued:

> ... but if we were to order the defendant to give the security asked for, it would be introducing an entirely new and wrong principle - which we ought not to do, even though we might think that, having regard to the circumstances of the case, it would be highly just to make the order.

That position remained until 1975 when the Court of Appeal, led by Lord Denning MR, in a series of two decisions seemed to have altered the accepted practice. The first case was *Nippon Yusen Kaisha v. Karageorgis & Anor*. [1975] 3 All ER 282. This was an appeal by the plaintiffs, Nippon Yusen Kaisha, against the refusal of Donaldson J (as he then was) to grant an *ex parte* application for the appointment of a receiver in respect of moneys, property and other sums held by the defendants, George Karageorgis and John Karageorgis, within the jurisdiction or for an injunction to restrain the said defendants from disposing of or dealing with any of their assets within the jurisdiction. The facts are that the plaintiffs are big shipowners of Japan and they entered into charter-party agreements with the defendants. When the defendants defaulted with the payment of the charterparty hire the plaintiffs took out a writ against them. Attempts to find the defendants failed and their office at Piraeus was closed. The plaintiffs rightly believed that the defendants had funds with banks in London. Fearing that the moneys in the banks might be transmitted out of the Court's jurisdiction before judgment, the plaintiffs applied for an interlocutory injunction against both defendants restraining them from disposing of or removing any of their assets in London out of the jurisdiction of the Court. This is what the learned Lord Denning MR said at p. 283:

> We are told that an injunction of this kind has never been done before. It has never been the practice of the English Courts to seize assets of a defendant in advance of judgment, or to restrain the disposal of them. We are told that Chapman J in chambers recently refused such an application. In this case also Donaldson J refused. We know, of course, that the practice on the continent of Europe is different. It seems to me that the time has come when we should revise our practice. There is no reason why the High Court or this Court should not make an order such as is asked for here. It is warranted by s. 45 of the Supreme Court of Judicature (Consolidation) Act 1925 which says the High Court may grant a *mandamus* or injunction or appoint a receiver by an interlocutory order in all cases in which it appears to

> the Court to be just or convenient so to do. It seems to me that this is just such a case. There is a strong *prima facie* case that the hire is owing and unpaid. If an injunction is not granted, these moneys may be removed out of the jurisdiction and the shipowners will have the greatest difficulty in recovering anything. Two days ago we granted an injunction *ex parte* and we should continue it.

The other Lord Justices, Browne LJ and Geoffrey Lane LJ (now Lord Chief Justice of England) agreed.

This decision was followed in the same year by a differently constituted Court of Appeal consisting of Lord Denning MR, Roskill and Ormrod LJ J in the case of *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1975] 2 Lloyd's LR 509 and only reported in the All England Law Reports in [1980] 1 All ER 213. In that case the shipowners let their vessel Mareva to the charters on a time-charterparty for a trip to the Far East and back. Mareva was delivered to the charterers on 12 May 1975, and they sub-chartered it on a voyage charter to the President of India. Hire way payable half monthly in advance and the charterers paid the first two instalments of the hire. The third instalment was due on 12 June 1975 but was not paid. An exchange of telexes between the shipowners and the charterers made it plain that the charterers were unable to pay. The shipowners treated the charterers' conduct as a repudiation of the charter and issued a writ claiming $US30,800 unpaid hire and damages for repudiation. The shipowners also applied for an *ex parte* injunction to restrain the charterer from removing or disposing of any of any of the moneys (which the charterers had received under the voyage charter) out of the jurisdiction. Donaldson J (as he then was) granted the injunction but only until 1700 on 23 June 1975 and refused to extend it. The shipowners appealed. After stating the above facts Lord Denning MR said at p. 510:

> They rely on the recent case of *Nippon Yusen Kaisha v. Karageorgis* [1975] 3 All ER 282. Mr. Justice Donaldson felt some doubt about that decision because we were not referred to *Lister v. Stubbs* [1890] 45 Ch D 1. There are observations in that case to the effect that the Court has no jurisdiction to protect a creditor before he gets judgment. Lord Cotton said:
>
> > I know of no case where, because it was highly probable that the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree.

And Lord Justice Lindley said:

> ... we should be doing what I conceive to be very great mischief if we were to stretch a sound principle to the extent to which the appellants ask us to stretch it ...
>
> Mr. Justice Donaldson felt that he was bound by *Lister v. Stubbs* and that he had no power to grant an injunction. But, in deference to the recent case, he did grant an injunction, but only until 1700 to-day (23 June 1975) on the understanding that by that time this Court would be able to reconsider the position.
>
> Now Mr. Rix has been very helpful. He has drawn our attention not only to *Lister v. Stubbs* but also to s. 45 of the Judicature Act 1925 which repeats s. 25(8) of the Judicature Act 1873. It says:
>
> > A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient ...

That was how the name Mareva Injunction first started and it is implicit from these 2 decisions of the Court of Appeal that reliance was placed on s. 45(1) of the Judicature Act 1925, which re-enacted s. 25(8) of the Supreme Court of Judicature (Consolidation) Act 1873 and not on the application of well-recognized equitable principles.

Two years later the correctness of these 2 decisions was challenged in the Court of Appeal presided over by Lord Denning MR and Orr LJ in the case of *Rasu Maritima SA v. Perusahaan Pertambangan* Minyak dan Gas Negara (Pertamina) [1977] 3 All ER 324. Learned Counsel for the respondent in that case suggested that these 2 judgments were wrongly decided and that the Court had no jurisdiction to grant a Mareva injunction. Lord Denning MR after carrying out a historical and comparative survey as to this procedure of seizure of assets before trial or judgment, reaffirmed the 2 decisions of the Court of Appeal. Orr LJ. agreed with the judgment of Lord Denning MR. relying also on s. 45(1) of the Judicature Act 1925.

In all these 3 cases it is clear that the defendants were either foreign based defendants or foreign registered companies who had assets within the jurisdiction of the Court.

In 1977 the case of *The Siskina* [1979] AC 210 presented the House of Lords with the opportunity to consider the Mareva injunction for the first time. It is implicit that their Lordships distinguished the cases establishing the Mareva injunction without approving or disapproving them. At p. 254 Lord Diplock said:

> My Lords, at no stage of the proceedings in the instant case has Counsel for the shipowners sought to argue that the High Court has no jurisdiction in appropriate cases to grant an interlocutory judgment of the Mareva type against a foreign defendant who is amenable to the jurisdiction of the Court in respect of the substantive claim to pecuniary relief made against him in the action. He reserved the right should it become necessary to attack the correctness of the decision in *The Mareva* [1975] 2 Lloyd's LR 509 which has recently been followed by the Court of Appeal after full argument on a contested application in another case, *Rasu Maritima SA v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Government of the Republic of Indonesia intervening) (The Pertamina)* [1978] QB 644, in which judgment was delivered on 9 March 1977. In the view that I take of the instant appeal, however, it can be disposed of on the grounds adopted by Kerr J and Bridge LJ. They distinguished it from The *Mareva* and *The Pertamina* by which decisions they were bound. Your Lordships, of course, are not so bound. Nevertheless I do not think that the instant appeal provides an appropriate vehicle to carry your Lordships into a consideration of the wider question of what restrictions, whether discretional or jurisdictional, there may be upon the powers conferred upon the High Court by s. 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 to:
>
> > grant a *mandamus* or an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the Court to be just or convenient so to do.

At p. 261 Lord Hailsham said:

> Since the House is no way casting doubt on the validity of the new practice by its decision in the instant appeal, I do not wish in any way to do so myself, but I must say that some at least of the arguments by which it is supported are, I would have thought, a little specious and I now refer to one of these in particular.
>
> One cannot help contrasting the comparatively favourable position accorded in the Mareve cases to the plaintiff suing a foreign based defendant with assets in England to whom RSC O. 11 can apply contrasted with that of a similar plaintiff with a claim against an English based defendant served in the ordinary way ... I believe the truth to be that sooner or later the Courts or the legislature will have to choose between two alternatives. Either the position of a plaintiff making a claim against an English based defendant will have to be altered or the

principle of the Mareva cases will have to be modified. In any event it is clear that Mareva injunctions cannot be allowed to flourish independently in the Arcadia of the commercial list without being applied in the High Court generally in all cases where plaintiffs and defendants are comparatively placed.

This was followed by an observation of Buckley LJ in *Cretanor Maritime Ltd. v. Irish Marine Ltd.* [1978] 3 All ER 164 @ 171 that

> In what circumstances it is justifiable for the Court to lend its authority in the exercise of a discretionary jurisdiction and one based fundamentally on equitable principles to bringing pressure to bear upon a party in this way is, I think, still open to debate. In the *Rasu Maritima* Case [1977] 3 All ER at 334 Lord Denning MR expressed the view, obiter, that an order restraining removal of assets can be made whenever the plaintiff can show that he has a "good arguable case". In *The Siskina* [1977] 3 All ER 803 at 822 Lord Diplock declined to enter on consideration of the question of what restrictions, whether discretionary or jurisdictional, there may be on the powers conferred on the High Court by s. 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925. See also Lord Hailsham's observations in the same case.

After the reservations expressed by Lord Diplock and Lord Hailsham the British Parliament in 1981 passed the Supreme Court Act 1981 and s. 37 deals with the powers of the High Court in England with respect to injunctions and receivers. The relevant part reads:

> s. 37(1) The High Court may by order(whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so.
>
> (2) ...
>
> (3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where the party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.
>
> (4) ...
>
> (5) ...

Since 1981 the Mareva injunction is now firmly based on s. 37(1) and (3) of the Supreme Court Act 1981 which enable the Court to grant an injunction of the Mareva-type wherever it appears to the Court to be just and convenient to do so, whether or not the defendant is domiciled, resident or present within the jurisdiction.

It is pertinent to note that the Court of Appeal and the English Judges have consistently refused to fall back on the inherent jurisdiction of the Court as a basis for the granting of the Mareva injunction.

The position in West Malaysia

I will now consider the position of the High Court in Malaya.

Section 25 of the Courts of Judicature Act 1964 reads:

> 25(1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.
>
> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule: Provided that all such powers shall be exercised in accordance with any written law or rules of Court relating to the same.

Now, s. 50 and s. 51(1) of the Specific Relief Act 1950 deal with the granting of temporary or perpetual injunctions and they are in the following terms:

> 50. Preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual.
>
> 51.(1) Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the law relating to civil procedure.
>
> (2) ...

Prior to Malaysia Day (16 September 1963) it is not in dispute that no reported Mareva injunction had been granted by the High Courts in West Malaysia.

It is common ground that the High Court in Malaya has jurisdiction to grant a temporary or interlocutory injunction in appropriate cases. This is clearly spelt out in ss. 50 and 51(1) of the Specific Relief Act 1950 and the procedure is regulated by O. 29 of the Rules of the High Court 1980. What is in dispute and this represents the main thrust of the submission of learned Counsel for the appellants is that the relevant sections read with s. 4(c) of the Specific Relief Act 1950 and s. 25 and para. 6 of the Schedule to the Courts of Judicature Act 1964 do not confer jurisdiction on the High Court in Malaya to grant an interlocutory injunction of the Mareva-type. Although the Specific Relief Act is silent as to how the discretion of the Court is to be exercised, Ong Hock Thye CJ (Malaya) in the Federal Court case of *Tee Than Song v. Caltex Oil Malaysia Ltd.* [1970] 1 MLJ 68 stated that

> The principles upon which an interlocutory injunction are granted in this country are the same as in England.

The settled rules by which the Courts in England were guided in determining whether they ought to interfere by way of interlocutory injunction to restrain an alleged debtor from dissipating or transferring his assets within the jurisdiction of the Courts were well-established. They had been clearly laid down by Lord Hatherley LC in *Mills v. Northern Railway of Buenos Ayres* (*supra*) at p. 628 (a decision of the Court of Appeal in Chancery) and the 2 decisions of the Court of Appeal in *Robinson v. Pickering* (*supra*) *and Lister & Co. v. Stubbs* (*supra*). These 3 judgments had gone unchallenged for almost a century and their correctness had not, according to my research, been called in question.

The first reported Malaysian case where an application was made to the High Court for a Mareva injunction was *Zainal Abidin bin Hj. Abdul Rahman v. Century Hotel Sdn. Bhd.* [1981] CLJ (Rep) 307. After reviewing the statutory powers of the Court and the relevant authorities Hashim Yeop Sani J (as he then was) held at p. 43 that:

> In my opinion it is clear that the High Court here possesses no power to grant restraining orders of the nature described as the Mareva injunction. We simply have no statutory provision corresponding to s. 45 of the English Court of Judicature (Consolidation) Act 1925 in the following words.

The *plaintiff* appealed to the Federal Court ([1982] 1 MLJ 260) (hereinafter referred to as *Zainal Abidin* case). Although the appeal was dismissed on the ground that there was no evidence to show that there was a danger that the available assets of the respondent would be dissipated to the prejudice of the appellant's claim the Federal Court did touch on the jurisdiction of the High Court to grant a Mareva injunction at p. 263 in the following words:

> Paragraph 6 of the Schedule to the Courts of Judicature Act 1964 would appear to be the equipollent provision to s. 45 of the English Supreme Court of Judicature (Consolidation) Act 1925 and reads:

6. Power to provide for the interim preservation of property the subject-matter of any cause or matter by sale or by injunction or the appointment of a receiver or the registration of a caveat or a *lis pendens* or in any other manner whatsoever.

We hold therefore that the provisions of para. 6 of Schedule to the Act are pertinent and do indeed apply and we are of the view that the same considerations are applicable as in the case of the English statutory provision of 1925. We have accordingly come to the conclusion that contrary to the learned Judge's view the High Court has jurisdiction to grant a Mareva injunction in appropriate circumstances.

In *S & F International Ltd. v. Trans-Con Engineering Sdn. Bhd.* [1985] CLJ (Rep) 280 the Federal Court appeared to follow *Zainal Abidin* case and it must be pointed out that, in my opinion, the Federal Court assumed without deciding that the High Court in Malaya has jurisdiction to grant a Mareva injunction. At p. 63 the Federal Court said:

The policy underlying and the principles governing an order of this nature have been expounded and ossified in a catenation of congeneric cases and the relief so afforded when the circumstances of a case merit it has been acknowledged by this Court in *Zainal Abidin bin Hj Abdul Rahman v. Century Hotel Sdn. Bhd.* [1982] 1 MLJ 260 in the matter of jurisdiction to avail here.

Comments:

I have been referred to *Zainal Abidin* case and great reliance is placed on it by learned Counsel for the respondents in this appeal. Speaking with all deferences to the learned Judges who constituted the Federal Court in *Zainal Abidin* case, it appears to me that the Federal Court seemed to rest its decision on the jurisdiction of the High Court to grant a Mareva injunction on para. 6 of the Schedule to the Courts of Judicature Act 1964. With the greatest respect to the learned Judges of the Federal Court, it appears that sufficient attention was not paid to the provisions of s. 25 and particularly to the proviso of subsection (2) to s. 25 of the Courts of Judicature Act 1964. Dealing with the Schedule to the Courts of Judicature Act 1964 the Federal Court speaking through Abdoolcader J (as he then was) in *Pahang South Union Omnibus Co. Bhd. v. Minister of Labour & Manpower* [1981] CLJ (Rep) 74 @ 204 said:

The proviso to s. 25 of the Courts of Judicature Act specifically enacts that all such powers of the High Court in the exercise of its jurisdiction as are referred to therein shall be exercised in accordance with any written law or rules of Court relating to the same. The proviso limits or qualifies what precedes it and the whole section inclusive of the proviso is to be read in such a manner that they mutually throw light on each other and result in a harmonious construction. The powers conferred on the High Court is the Schedule to the Courts of Judicature Act are only enabling powers empowering the exercise of jurisdiction in respect of the matters specified therein but only in accordance with any written law or rules of Court relating thereto. They are merely declaratory of the jurisdiction of the High Court and are subject to restrictions or conditions imposed by legislative provisions pertaining to their exercise.... Section 25(2) of the Courts of Judicature Act does not confer any powers as such but only indicates that there is power to make such orders specified in the Schedule thereto as may be necessary **when power so to do is either provided for or is not excluded by some statutory provision and then only within the ambit of its content.** (Emphasis supplied)

With the greatest respect, it seems to me that when the Federal Court in *Zainal Abidin* case opined that the High Court in Malaya has jurisdiction to grant a Mareva injunction on the ground that para. 6 of the Schedule to the Courts of Judicature Act 1964 would appear to be the equipollent provision of s. 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 it fell into the same error which another Federal Court appeared to have fallen into in

deciding the case of *Damodaran v. Vasudevan* [1975] 2 MLJ 231. In the *Damodaran* case the High Court ordered a *lis pendens* to be registered in respect of certain disputed lands in Kedah under para. 6 of the Schedule *albeit* there was no written law providing for the making and registration of such Order in West Malaysia. On appeal the Federal Court upheld the decision of the High Court and at p. 232 Suffian LP said:

> In my judgment, subsection (2) of s. 25 of our Courts of Judicature Act is quite clear. It does not say that our High Court may provide for the interim protection of property the subject of litigation by the registration of a *lis pendens*, if and only if written law or rules of Court so provide, as is contended by Mr. Mooney. It says quite plainly that High Court shall have power to provide for the interim protection of such property by the registration of a *lis pendens.* The proviso in my judgment means only this: that if there are written laws or rules of Court relating to the same, then this power must be exercised in accordance with them. **The proviso does not mean that if there are no written laws or rules of Court relating to the same, then the power cannot be exercised at all**. (Emphasis supplied)

In a related appeal some four years later in the case of *Damodaran v. Choe Kuan Hin* [1979] 2 MLJ 267 Lord Diplock when giving the judgment of the Privy Council, commented on the *Damodaran v. Vasudevan* case at p. 270 in the following words:

> It follows that, in their Lordships' view, the entry on the register of an order of *lis pendens* is a mere *brutum fulmen.* Even if it be lawful to make such an entry at all, it serves no useful purpose and their Lordships would suggest that the precedent set by *Damodaran v. Vasudevan* is one which ought not to be followed. Where by reason of a pending action in which the title to registered land is in dispute, it would be just to suspend the registered proprietor's right to transfer the land pending the determination of the action, the proper and effective way of doing so is by entry of a private caveat.

It seems to me that the decision of the Federal Court in the *Damodaran v. Vasudevan* case has been disapproved by the Privy Council and although not expressly overruled it seems unlikely that it will be followed in the future.

Again with the greatest respect, I am unable to accept the judgment of the Federal Court in *Zainal Abidin* case that para. 6 of the Schedule to the Courts of Judicature Act 1964 would appear to be the equipollent provision of s. 45 of the Supreme Court of Judicature (Consolidation) Act 1925 because unlike para. 6 which restricts the power of the Court to grant an interlocutory injunction only to cases where the property of the defendant has to form the subject-matter of the action, no such limitation exists in s. 45(1) which gives to the High Court jurisdiction to make an interlocutory order **in all cases** (emphasis given) in which it appears to the Court to be just or convenient to do so. This important distinction seemed to have been overlooked by the learned Judges of the Federal Court.

Speaking of s. 45(1) of the Judicature Act 1925 in the case of *Gouriet v UPW (Union of Post Office Workers)* [1978] AC 435 Lord Edmund-Davies said at p. 516 that "The provision by s. 45(1), replacing s. 25(8) of the Judicature Act 1873 and enabling the High Court to grant an injunction "by an interlocutory order in all cases in which it appears to the Court to be just or convenient so to do", dealt only with procedure and had nothing to do with jurisdiction. In *North London Railway Co. v. Great Northern Railway Co.*[1883] 11 QBD 30 Cotton LJ said at p. 39:

> If it was intended to give the enormously increased power which it is contended is given by this section, - s. 25(8) of the Act of 1873:
>
> > it is remarkable that it empowers it to be done by interlocutory order. It is said if it can be done by interlocutory order, of course it can be done by a final order at the hearing of the cause or judgment; no doubt that it is true; but when the section only

> refers to interlocutory orders and not to orders for injunction to be made at the hearing of the cause, is not the *prima facie* presumption that it did not intend to give the right to an injunction to parties who before had no legal right whatever, but simple to give to the Court, when dealing with legal rights which were under its jurisdiction independently of this section, power, if it should think it just or convenient, to superadd to what would have been previously the remedy.... so that where there is a legal right the Court may, without being hampered by its old rules, grant an injunction where it is just or convenient to do so for the purpose of protecting or asserting the legal rights of the parties.

It is my considered opinion that insofar as the Federal Court in *Zainal Abidin* case purported to decide that the High Court in Malaya has jurisdiction to grant a Mareva injunction based on para. 6 of the Schedule to the Courts of Judicature Act 1964 which would appear to be the equipollent provision of s. 45(1) of the Judicature Act 1925 it was made *per incuriam.*

Jurisdiction:

The High Court in Malaya is empowered by ss. 50 and 51(1) of the Specific Relief Act 1950 to grant an interlocutory injunction in appropriate cases. Although the discretion appears to be unfettered it is however, established that the exercise of this equitable jurisdiction is to be governed by well-organized judicial principles. In *Tee Than Song v. Caltex Oil Malaysia Ltd.* (*supra*) Ong Hock Thye CJ (Malaya) speaking in the Federal Court at p. 68 said that

> The principles upon which an interlocutory injunction are granted in this country are the same as in England.

One of these settled rules established in England is that the High Court has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which the Court has jurisdiction to enforce by final judgment [see the classic judgment of Cotton LJ in *North London Railway Co. v. Great Northern Railway Co.* (*supra*). This principle was cited with approval by Lord Edmund-Davies in the *Gouriet* case and by Lord Diplock in The *Siskina* case at p. 256F and appears to be recognized by s. 4 of the Specific Relief Act 1950 which provides *inter alia,* that specific relief is given by preventing a party from doing that which he is under an obligation not to do (see subsection (c)) and specific relief granted under s. 4(c) is called preventive relief (see s. 5).

Applying the well-established equitable principles laid down in *Mills v. Northern Railway of Buenos Ayres* (*supra*), *Robinson v. Pickering* (*supra*) *and Lister & Co. v. Stubbs* (*supra*) as well as the classic judgement of Cotton LJ in *North London Railway Co. v. Great Northern Railway Co.* (*supra*) I am inclined to agree with the opinion of Hashim Yeop Sani J (as he then was) in *Zainal Abidin bin Hj. Abdul Rahman v. Century Hotel Sdn. Bhd.* (*supra*) that based on s. 50 and s. 51(1) ofthe Specific Relief Act 1950 and the application of well-established equitable principles the High Court in Malaya possesses no power to grant restraining order of the nature described as the Mareva injunction. In coming to this conclusion I am reminded that where the jurisdiction of the Court is statutory, the Court, however admirable its intentions, is not entitled to go outside the written law and, in effect, purported to legislate for itself *(see Magor & St. Mellons RDC v. Newport Corporation* [1952] AC 189 and *London Transport Executive v. Batts* [1959] AC 213). The constitutional function performed by the Courts of justice is to interpret and apply the written law laid down in Acts of Parliament. It is for Parliament, not for the judiciary, to decide any changes should be made to the law as stated in the Acts, and if so, what are the precise limits.

For the above reasons I would allow the appeal and set aside the Mareva injunction granted by the High Court.

That would dispose of the appeal but learned Counsel for the appellants' alternative submission was that if the High Court in Malaya had jurisdiction to grant a Mareva injunction it was contended that such an interlocutory order could not and ought not to be made against a person or company who is not and/or has not been made a party to the action. To understand this submission I need only state very briefly the pertinent facts. It seems to me that the plaintiffs in this appeal took out a writ against the defendant, Lorrain Esme Osman claiming *inter alia*, a number of declarations in the alternatives and lastly the sum of RM27,652,853.06. The plaintiffs applied and were granted a Mareva injunction directing not only against the defendant but also his servants or agents or nominees or otherwise howsoever. The nominees named in the Mareva injunction are five in number. Later, on the application of the plaintiffs the Mareva injunction was varied to (a) to include the names of 94 companies and/or his nominee companies and (b) an Anton Piller Order addressed to Aspatra Sdn. Bhd. one of the nominee companies. 29 out of the 94 companies applied to the Court for (i) leave to intervene and (ii) to discharge the Mareva injunction and the Anton Piller order in so far as it applies or affects them. The learned Judge refused the application to dissolve the Mareva injunction and the Anton-Piller order in respect of the 22 companies only and they are the appellants/interveners named in this appeal. These 22 companies are not made co-defendants in the suit filed by the plaintiffs.

References were made to *Galaxia Maritime SA v. Mineralimportexport* [1982] 1 ALL ER 796, *Z Ltd. v. A* [1982] 1 ALL ER 556 and *SCF Finance Co. v. Masri & Anor.* [1985] 2 ALL ER 747. It seems to me that all these decisions of the Court of Appeal might have been based on s. 37(1) and (3) of the Supreme Court Act 1981 and not under s. 45(1) of the Judicature Act 1925 which appeared to have been relied on by the Federal Court in *Zainal Abidin* case, and since I have not heard full submissions whether different considerations would apply, I would not make any decision on the point raised preferring to reserve it to be thoroughly argued at some future date when the same point should come up for determination.

Similarly, I express no opinion whether or not the corporation veil should be pierced when dealing with an application for a Mareva injunction, either in the interest of justice or to prevent an injustice. I refrain from expressing which of the two tests ought to be applied.

In my opinion, the plaintiffs in this appeal are not without remedy and there is no lacuna in the law because s. 19 of the Debtors Act 1957 expressly provides for application to be made after the filing of the writ to attach the property of the defendant,before judgment, to answer the just demand of the plaintiffs until the trial of the action and satisfaction of any judgment that may be made against him even though the plaintiffs do not assert any proprietary claim over the property of the defendant. This procedure appears to find some support in the *dictum* of Lord Diplock in *Damodaran v. Choe Kuan Hin* (*supra*) at p. 270.

Also found at [1987] 2 CLJ 377